Filed 4/30/19 Garcia v. Lacey CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

GUILLERMO GARCIA,

Plaintiff and Appellant,

v.

B.A. LACEY et al.,

Defendants and Respondents.

F078786

(Super. Ct. No. CV57059)

OPINION

ORIGINAL PROCEEDINGS to determine whether Guillermo Garcia is a vexatious litigant and related remedies.

Guillermo Garcia, in pro. per., for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Monica N. Anderson, Assistant Attorney General, Neah Huynh and Joanna B. Hood, Deputy Attorneys General, for Defendants and Respondents.

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In response to the appeal in case No. F074756 by plaintiff Guillermo Garcia (plaintiff), defendants and respondents B.A. Lacey, F.X. Chavez, P. Quinn, J. Kavanaugh, D. Wattle, C. Koenig, M. Baldwin, J. Tennison, and H.M. Lackner (defendants) have filed a motion under the vexatious litigant law (Code Civ. Proc.,

§§ 391–391.8)[1] requesting that we (i) declare plaintiff a vexatious litigant, (ii) impose a prefiling order against him, and (iii) require him to post security in plaintiff's appeal in case No. F074756. We agreed to hear defendants' motion as a separate proceeding (case No. F078786), afforded plaintiff an opportunity to file opposition, and set the matter for hearing. Having considered the moving, opposing and reply papers and the parties' oral argument, we find that plaintiff is a vexatious litigant. Because of plaintiff's misuse of the courts of this state, we impose a prefiling order against him pursuant to section 391.7. Furthermore, because we conclude that plaintiff does not have a reasonable probability of prevailing in his appeal in case No. F074756, we also grant defendants' motion that plaintiff be required to furnish security in that appeal pursuant to section 391.1.

FACTS AND PROCEDURAL HISTORY

Although defendants' vexatious litigant motion was originally filed by defendants in plaintiff's appeal in case No. F074756, on this court's own motion the vexatious litigant motion was deemed to be a separate proceeding and was assigned a new case number, i.e., the present case No. F078786. Nevertheless, in our consideration of the vexatious litigant motion, we refer to background facts in case No. F074756 relating to plaintiff's third amended complaint and the demurrer in that matter. This includes our summary below of the demurrer proceedings in the trial court that resulted in the judgment from which plaintiff appealed in case No. F074756.

Demurrer Proceedings in the Trial Court

After several prior unsuccessful attempts to plead a cause of action, plaintiff filed his third amended complaint (TAC) in the trial court on January 3, 2016. According to the TAC, plaintiff is an inmate incarcerated at a State prison facility. Defendants were public employees for the California Department of Corrections and Rehabilitation

[1] Unless otherwise indicated, all further statutory references are to the Code of Civil Procedure.

(CDCR), serving in various capacities. Defendants Lacey and Wattle allegedly worked as correctional officers in Building 5 at Sierra Conservation Center, the prison where Garcia lived at the time of the alleged incidents.

In the TAC, plaintiff alleged an assortment of conduct he characterized as harassment. Allegedly, defendant Lacey harassed him by asking for copies of an inmate grievance, threatening to move plaintiff out of the building, calling him insulting names, identifying him as a child molester, asking him to take off his socks, stopping him from going to the law library, reading his mail and making false "write ups." On other occasions, defendants Lacey and Wattle allegedly entered and searched plaintiff's cell and confiscated certain property items, including envelopes and documents, reading glasses, magazines, and headphones, without providing a proper receipt for the confiscated items. Additionally, defendants Lacey and Wattle allegedly entered plaintiff's cell and confiscated his typewriter on the ground that they found contraband. Unspecified defendants allegedly gave plaintiff more "false write ups," and as a result plaintiff ended up in confinement in his cell for 14 days. Defendant Quinn allegedly retaliated against plaintiff by not letting him use the library's restroom.

Plaintiff also alleged in the TAC that he filed multiple inmate grievances concerning the conduct of defendants Lacey and Wattle. According to plaintiff, the other defendants he named in the TAC, including Tennison, Baldwin, Kavanaugh, Quinn, Koenig, Lackner, Chavez and Foston[2] allegedly "allowed, failed to prevent, concealed or condoned" the conduct of Lacey and Wattle by routinely denying or disposing of plaintiff's grievances and administrative appeals.

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[2] Defendants' counsel (Joanna B. Hood, Deputy Attorney General, Office of the Attorney General of California) notes that defendant Foston was never served by plaintiff and, therefore, he is not a party and is not represented by the Attorney General in this matter.

Defendants filed a demurrer to the TAC, and a hearing on the demurrer was conducted by the trial court on September 23, 2016. On November 8, 2016, the trial court entered its order sustaining defendants' demurrer to the TAC, without leave to amend. In denying leave to amend, the trial court explained: "1) Plaintiff failed to comply with the claim presentation requirement of the Government Claims Act because the allegations in his government claim are not equivalent to the allegations in his third amended complaint; [¶] 2) The allegations in plaintiff's complaint are uncertain; [¶] 3) Plaintiff failed to state any cognizable causes of action; and [¶] 4) Further amendment would be futile, as plaintiff has already amended his complaint three times, and plaintiff explicitly disavowed any desire to further amend in his opposition to defendants' demurrer. [¶] Therefore, Defendants' demurrer to plaintiff's third amended complaint is sustained without leave to amend and this case is dismissed."

On November 21, 2016, plaintiff filed a timely notice of appeal from the trial court's judgment of dismissal entered following the trial court's order sustaining the demurrer without leave to amend. As noted, plaintiff's appeal was filed as case No. F074756.

Defendants Interpose Motion for Relief under Vexatious Litigant Law

On December 29, 2017, while plaintiff's appeal was (and is) still pending, defendants filed in this court the instant motion for relief under the vexatious litigant law. The motion is made on the ground that plaintiff is a vexatious litigant because he has previously filed a total of eight unsuccessful litigations in state and federal courts within the past seven years. In connection with their motion, defendants have submitted a request for judicial notice attaching various court records to substantiate plaintiff's multiple unsuccessful litigations during the past seven years.[3] Additionally, in seeking an order requiring plaintiff to furnish security for litigation expenses, defendants' motion is

[3] We grant defendants' request for judicial notice.

made on the further ground that plaintiff does not have a reasonable probability of prevailing in the instant appeal. In support of the latter point, defendants argue (as they did in their demurrer in the trial court) that plaintiff failed to adequately comply with the claims filing requirement of the Government Claims Act (Gov. Code, § 900 et seq.), and that the allegations in the TAC were vague, conclusory or otherwise insufficient to state a cause of action.

Plaintiff filed opposition to the motion on April 19, 2018, raising several arguments that he should not be considered vexatious. Defendants' reply was filed on August 7, 2018. After we set the hearing date by order to show cause, additional briefing was received from plaintiff.

In the discussion section of this opinion (below), we address the merits of the motion and set forth the reasons for our determinations on the relief requested by defendants. We begin with an overview of the vexatious litigant law.

DISCUSSION

I. Vexatious Litigant Law

The vexatious litigant law was enacted to curb misuse of the court system by those acting in propria persona who repeatedly file groundless lawsuits or attempt to relitigate issues previously determined against them. (§§ 391–391.8; *Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1169 [the statute protects courts and litigants from such misuse by "persistent and obsessive" propria persona litigants]; *In re Kinney* (2011) 201 Cal.App.4th 951, 957–958 [the vexatious litigant statutes address " 'the problem created by the persistent and obsessive litigant who constantly has pending a number of groundless actions and whose conduct causes serious financial results to the unfortunate objects of his or her attacks and places an unreasonable burden on the courts' "]; *Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 220–221.) The abuse of the system by such individuals "not only wastes court time and resources but also prejudices other parties waiting their turn before the courts." (*In re Bittaker* (1997) 55 Cal.App.4th 1004, 1008.)

The statute provides a "means of moderating a vexatious litigant's tendency to engage in meritless litigation." (*Bravo v. Ismaj*, *supra*, 99 Cal.App.4th at p. 221.)

A court may declare a person to be a vexatious litigant who, in "the immediately preceding seven-year period[4] has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been … finally determined adversely to the person …." (§ 391, subd. (b)(1).) The term " 'litigation' " is defined broadly as "any civil action or proceeding, commenced, maintained or pending in any state or federal court." (§ 391, subd. (a).) A litigation includes an appeal or civil writ proceeding filed in an appellate court. (*McColm v. Westwood Park Assn*. (1998) 62 Cal.App.4th 1211, 1216; *In re R.H*. (2009) 170 Cal.App.4th 678, 691–692.) A litigation is finally determined adversely to a plaintiff if he does not win the action or proceeding he began, including cases that are voluntarily dismissed by a plaintiff. (*Tokerud v. Capitolbank Sacramento* (1995) 38 Cal.App.4th 775, 779; *In re Whitaker* (1992) 6 Cal.App.4th 54, 56.)[5] Qualifying litigations for purposes of the vexatious litigant law include appeals dismissed as untimely (*Fink v. Shemtov*, *supra*, 180 Cal.App.4th at pp. 1173–1174), and appeals from multiple orders within the same case that are finally determined adversely to the appellant (*In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 1005–1006 [appellant declared vexatious litigant based on appeals of numerous orders in a marital dissolution]).

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4 An action is counted as being within the "immediately preceding seven-year period" if it was filed or maintained during that period. (*Stolz v. Bank of America* (1993) 15 Cal.App.4th 217, 225.) The seven-year period is measured retrospectively from the time the motion is filed. (*Id*. at p. 224.)

5 A particular litigation is "finally" determined when avenues for direct review (appeal) have been exhausted or the time for appeal has expired. (*Childs v. PaineWebber Incorporated* (1994) 29 Cal.App.4th 982, 993; see *Fink v. Shemtov* (2010) 180 Cal.App.4th 1160, 1172 [summary denial of a writ not necessarily "finally determined adversely to the person" for purposes of § 391, subd. (b)(1)].)

Regarding a motion to furnish security, section 391.1 provides as follows: "In any litigation pending in any court of this state, at any time until final judgment is entered, a defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security …." The motion "shall be based upon the ground, and supported by a showing, that the plaintiff is a vexatious litigant and that there is not a reasonable probability that he or she will prevail in the litigation against the moving defendant." (*Ibid*.) Section 391.3 sets forth the basis for granting the motion: "[I]f, after hearing the evidence upon the motion, the court determines that the plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will prevail in the litigation against the moving defendant, the court shall order the plaintiff to furnish, for the benefit of the moving defendant, security in such amount and within such time as the court shall fix." (§ 391.3, subd. (a).)

In ruling on a motion to furnish security, the court's findings are for the limited purpose of whether to furnish security and, pursuant to section 391.2, are not a determination of any issue in the litigation or the merits thereof. (§ 391.2; see *Moran v. Murtaugh Miller Meyer & Nelson, LLP* (2007) 40 Cal.4th 780, 786 (*Moran*) [noting a section 391.1 motion does not terminate an action or preclude a trial; it merely requires a plaintiff to post security].) However, if security is ordered by the court and is not furnished by the plaintiff, "the litigation shall be dismissed as to the defendant for whose benefit [the security] was ordered furnished." (§ 391.4.)

As to prefiling orders, section 391.7 subdivision (a) states: "In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed. Disobedience of the order by a vexatious litigant may be punished as a contempt of court." Section 391.7 operates prospectively "beyond the pending case and affects the

litigant's future filings." (*McColm v. Westwood Park Assn., supra,* 62 Cal.App.4th at p. 1216.) Under section 391.7, when a person subject to the prefiling order seeks to file a new litigation (whether in the trial court or appellate court), the presiding judge or justice "shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay." (§ 391.7, subd. (b).) In making the decision of whether to allow the new litigation to be filed, the presiding judge or justice "may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3." (*Ibid*.)

A motion to declare a party to be a vexatious litigant and to request relief under the vexatious litigant law may be heard and decided by the Court of Appeal in the first instance. (*In re Marriage of Falcone & Fyke, supra,* 203 Cal.App.4th at p. 1005; *In re R.H., supra,* 170 Cal.App.4th at pp. 691–692; *Andrisani v. Hoodack* (1992) 9 Cal.App.4th 279, 281; *In re Whitaker, supra,* 6 Cal.App.4th at pp. 55–57.) Where a litigant has not already been declared vexatious, and has not previously received the benefit of a noticed motion and hearing, the appellate court may declare the litigant vexatious by following a noticed motion process in the appellate court. (*Bravo v. Ismaj, supra,* 99 Cal.App.4th at p. 225.)

II. Plaintiff is a Vexatious Litigant

A person qualifies as a vexatious litigant if "[i]n the immediately preceding seven-year period [he or she] has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been … finally determined adversely to the person …." (§ 391, subd. (b)(1).) Here, based on the court records submitted for judicial notice, defendants assert that plaintiff has filed eight unsuccessful litigations in state and federal courts within the past seven years.

The unsuccessful litigations identified by defendants include the following:

1. *Garcia v. Chavez et al*., Fifth District Court of Appeal case No. F074434. Plaintiff's appeal taken from nonappealable order dismissed on March 23, 2017, and remittitur issued May 23, 2017.[6]

2. *Garcia v. Chavez et al*., Tuolumne County Superior Court case No. CV56477. Defendants' motion for summary judgment granted, and judgment entered against plaintiff on November 17, 2016.

3. *Garcia v. Lacey et al*., Fifth District Court of Appeal case No. F073831. Plaintiff's appeal dismissed on September 1, 2016 based on nonappealable order and lack of jurisdiction. Remittitur issued on November 1, 2016.

4. *Garcia v. Chavez et al*., Fifth District Court of Appeal case No. F072551. Plaintiff's appeal dismissed as abandoned on December 4, 2015, and remittitur issued on February 3, 2016.

5. *Garcia v. Mix et al.*, U.S. District Court, Eastern District of California, case No. 1:10-cv-02097. Defendants' motion for summary judgment granted, and judgment entered on March 24, 2015.

6. *Garcia v. U.S. District Court for the Eastern District of California*, Ninth Circuit Court of Appeals No. 14-73582. Petition for writ of mandate denied January 13, 2015.

7. *Garcia v. McCue et al.*, Ninth Circuit Court of Appeals No. 13-17636. Plaintiff's request for voluntary dismissal of appeal granted as of March 5, 2014.

8. *Garcia v. Dept. of Industrial Relations et al*., Ninth Circuit Court of Appeals No. 13-55107. Appeal dismissed as of May 30, 2013 due to failure to prosecute or pay filing fee.

Based on the above described litigations, all of which were finally determined adversely to plaintiff within the past seven years, defendants have established that

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6 Although the dismissal in case No. F074434 was without prejudice, plaintiff failed to cure his deficient appeal in that case by timely providing a final judgment from the trial court. Eventually, the remittitur was issued and the time for an appeal from the underlying judgment expired. As a result, the matter has become final.

plaintiff qualifies as a vexatious litigant under section 391, subdivision (b)(1). We therefore declare plaintiff to be a vexatious litigant.

III. Plaintiff's Arguments Are Without Merit

Plaintiff argues that because some of the "litigations" described above were appeals or writs taken by plaintiff from orders arising from the same underlying cases, they cannot individually constitute separate litigations. Plaintiff is mistaken. The term "litigation" is broadly defined in the vexatious litigant statute, and includes any appeal or writ proceeding filed by a party plaintiff, other than a writ of habeas corpus. (*McColm v. Westwood Park Assn., supra,* 62 Cal.App.4th at pp. 1216, 1219, disapproved on other grounds in *John v. Superior Court* (2016) 63 Cal.4th 91, 99, fn. 2.) " 'Litigation' for purposes of vexatious litigant requirements encompasses civil trials and special proceedings, but it is broader than that. It includes proceedings initiated in the Courts of Appeal by notice of appeal or by writ petitions other than habeas corpus or other criminal matters." (*McColm v. Westwood Park Assn., supra,* 62 Cal.App.4th at p. 1219.) Indeed, where a plaintiff challenges multiple orders from the same case by filing separate appeals and writs, each appeal or writ finally and adversely determined may qualify. (*In re Marriage of Falcone & Fyke, supra,* 203 Cal.App.4th at pp. 1005–1006 [qualifying litigations arising out of the same superior court case included denial of a writ petition, the dismissal of an appeal from a nonappealable order, the dismissal of an appeal for failure to file an opening brief, and appeals taken from various orders affirmed on the merits].) Similarly, qualifying litigations for purposes of the vexatious litigant law have been held to include two separate appeals filed in the same case that were each dismissed as untimely. (*Fink v. Shemtov, supra,* 180 Cal.App.4th at pp. 1173–1174.) As the above case authorities demonstrate, plaintiff's argument that distinct appeals or writs arising out of the same underlying cases cannot constitute separate litigations is without merit.

Next, plaintiff contends that in *John v. Superior Court, supra,* 63 Cal.4th 91, the Supreme Court reversed the holding of *McColm v. Westwood Park Assn., supra*, that

each separate appeal or writ may constitute a separate "litigation" for purposes of the vexatious litigant law. Plaintiff is again mistaken. Contrary to plaintiff's argument, *John* only held that the prefiling requirement of section 391.7 (i.e., that the vexatious litigant obtain approval of the presiding justice) does not apply to an appeal filed by a party who was the *defendant* in the trial court. (*John v. Superior Court*, *supra*, 63 Cal.4th at p. 100.) The Supreme Court disapproved *McColm v. Westwood Park Assn*. only insofar as it could potentially be construed as implying that section 391.7 would apply to "all" vexatious litigant appellants and writ petitioners. (*John v. Superior Court*, *supra*, 63 Cal.4th at p. 99, fn. 2.) *John*, therefore, does not assist plaintiff, since plaintiff was not a defendant in any of the underlying litigations and he was not, until now, subject to a prefiling order.

Plaintiff also argues that some of the litigations referred to herein by defendants may have involved pleadings or complaints that were merely lodged but never filed, as was the case in a previous appeal before this court involving the same parties. In that prior appeal, which was published as *Garcia v. Lacey* (2014) 231 Cal.App.4th 402, we concluded that where pleadings were merely lodged in the federal district court (pending a prescreening process for *in forma pauperis* applications submitted by inmates) but never actually filed, the lodged pleadings would not constitute litigation under the vexatious litigant law because a case is not commenced until it is actually filed. (*Id*. at pp. 411–412.) Plaintiff's argument is not substantiated by the judicially noticed court records presently before us. As correctly noted in defendants' reply brief, each of the underlying litigations presented by defendants in connection with their motion are shown by the record to be filed and docketed matters.

Finally, plaintiff argues that the vexatious litigant law and the remedies available under that law are unconstitutional infringements on due process and the right to petition. The vexatious litigant law has been challenged on these and other constitutional grounds many times, and the appellate courts have consistently rejected such claims. (See, e.g.,

Fink v. Shemtov, supra, 180 Cal.App.4th at pp. 1170–1171; *In re R.H., supra,* 170 Cal.App.4th at pp. 701–703; *Bravo v. Ismaj, supra,* 99 Cal.App.4th at p. 222; *Wolfgram v. Wells Fargo Bank* (1997) 53 Cal.App.4th 43, 55–61*; In re Whitaker, supra,* 6 Cal.App.4th at pp. 56–57.) We find these precedents to be persuasive and we follow them here. Therefore, plaintiff's constitutional challenge is without merit and does not require further discussion.

IV. Prefiling Order

As we have decided herein, plaintiff is a vexatious litigant. Further, plaintiff's multiple unsuccessful lawsuits have demonstrated a willingness on his part to misuse the courts of this state.[7] We conclude that it is appropriate to grant defendants' request for a prefiling order under section 391.7. (See *In re Marriage of Falcone & Fyke, supra,* 203 Cal.App.4th at p. 1007 [appellate court found an appellant to be vexatious litigant and issued prefiling order]; *In re Kinney, supra,* 201 Cal.App.4th at pp. 960–961 [same].) Therefore, pursuant to that section, the order of this court is that plaintiff, Guillermo Garcia, may not file any new litigation in the courts of the State of California in propria persona without first obtaining leave of the presiding judge or presiding justice of the

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[7] The eight litigations identified in the present motion are more than ample to establish this fact. In passing, we also note certain facts observable from the earlier appeal involving plaintiff (i.e., *Garcia v. Lacey, supra,* 231 Cal.App.4th at pp. 408–413). In that prior appeal, we reversed a trial court's finding that plaintiff was a vexatious litigant because, in that particular case, five out of the nine prior litigations referenced in support of the motion did not qualify under the vexatious litigant law. Although plaintiff had *attempted* to file all five litigations in federal court, nevertheless, due to screening procedures used by that federal court, the pleadings in those five matters were returned to him unfiled. (See *Garcia v. Lacey, supra,* 231 Cal.App.4th at pp. 411–412.) In a sense, plaintiff escaped from vexatious litigant treatment merely because of the thoroughness of the federal court's prescreening process. He had obviously intended to file all nine of the meritless litigations, and he did everything in his power to do so, but his efforts were thwarted in the five instances by the federal screening procedures relating to prisoner lawsuits. As the present motion indicates, no lessons were learned on plaintiff's part and his propensity to file meritless or unsuccessful cases has continued unabated.

court where the litigation is proposed to be filed. (§ 391.7, subd. (a).) Disobedience of the foregoing prefiling order may be punished as a contempt of court. (*Ibid*.) The clerk of this court is directed to provide a copy of this opinion and order to the Judicial Council. (§ 391.7, subd. (f).)

V. Motion to Furnish Security for Costs of Litigation

A. The Nature of a Motion to Furnish Security under Section 391.1

Finally, defendants' motion includes a request, pursuant to section 391.1, that plaintiff be ordered to furnish security as a condition of proceeding with the appeal in case No. F074756.

A motion to furnish security requires a judicial determination that plaintiff is not reasonably likely to prevail in the subject litigation. (§§ 391.1, 391.3.) Such a determination is based upon an evaluative judgment in which the court is permitted to receive and weigh evidence. (*Moran, supra,* 40 Cal.4th at pp. 785–786; see § 391.2.) In weighing the evidence, the court is not required to assume the truth of plaintiff's allegations or determine only whether the claim is foreclosed as a matter of law. (*Moran, supra,* 40 Cal.4th at pp. 782, 785, fn. 7.) Instead, the court "performs an evaluative function" based on the weight of the evidence. (*Id*. at p. 786.) Although the showing that there is no reasonable likelihood of the plaintiff prevailing "is ordinarily made by the weight of the evidence," a lack of merit "may also be shown by demonstrating that the plaintiff cannot prevail in the action as a matter of law." (*Golin v. Allenby* (2010) 190 Cal.App.4th 616, 642 [noting that "potentially dispositive pleading defects" could have been, but were not, raised by moving party].)

A court's conclusion on a motion under section 391.1 that there is no reasonable probability that plaintiff will prevail in the litigation is meant to be provisional in nature. That is, it does not operate to terminate the action or decide issues; rather, it merely requires the party to post security. (*Moran, supra,* 40 Cal.4th at pp. 784–786; see § 391.2.) As the Supreme Court explained in the *Moran* case: "A section 391.1 motion

does not terminate an action as does the sustaining of a demurrer. To the contrary, section 391.2 expressly states: 'No determination made by the court in determining or ruling upon the motion shall be or be deemed to be a determination of any issue in the litigation or of the merits thereof.' The grant of a section 391.1 motion does not preclude a trial; it merely requires a plaintiff to post security." (*Moran, supra*, 40 Cal.4th at p. 786.)

" 'Security' " is defined as "an undertaking to assure payment, to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, including attorney's fees and … costs, incurred in or in connection with a litigation instituted … by a vexatious litigant." (§ 391, subd. (c).) In setting the amount of the security, the court simply endeavors to secure the requesting party against expenses, including reasonable attorney fees, incurred as a result of the litigation. The vexatious litigant's means or ability to pay is not part of the analysis. (*McColm v. Westwood Park Assn.*, *supra*, 62 Cal.App.4th at p. 1219.)

B. Defendants Are Entitled to Security under Section 391.1

Here, as will be seen, defendants' motion for security relies partly on evidence (i.e., the government claim filed by plaintiff) and partly on the vague, vacuous or otherwise defective nature of the allegations set forth in plaintiff's TAC, which pleading we emphasize was his fourth attempt to adequately state a cause of action. Although the showing that there is no reasonable likelihood of a plaintiff prevailing is ordinarily made by weighing evidence, we believe in the procedural setting before us it may also be shown by pointing out substantial or glaring pleading defects that would presumably be dispositive of the appeal. (See *Golin v. Allenby*, *supra*, 190 Cal.App.4th 616, 642.) Accordingly, we proceed to consider defendants' motion for security.

1. *The Government Claim*

Defendants first argue that plaintiff is not reasonably likely to prevail because of the gross inadequacy of his government claim presented under the Government Claims

Act (Gov. Code, § 900 et seq.). Since the government claim is a public record of a state agency, we grant defendants' request for judicial notice of the government claim and its contents. (*Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1750; *Chas. L. Harney, Inc. v. State of California* (1963) 217 Cal.App.2d 77, 85–86.)[8] In particular, defendants assert that plaintiff's government claim was inadequate to comply with the Government Claims Act because the allegations of the TAC do not fairly correspond to the matters set forth in the government claim, and therefore plaintiff cannot maintain his causes of action against defendants. As explained below, we conclude defendants are correct.

The Government Claims Act requires that a lawsuit seeking monetary damages against a public employee for an injury resulting from an act or omission in the course of public employment must be preceded by the presentation of a claim to the California Victim Compensation and Government Claims Board. (*Briggs v. Lawrence* (1991) 230 Cal.App.3d 605, 612.) Satisfying the claim presentation requirement is a condition precedent to filing suit, and compliance (or excuse) must be affirmatively alleged as an essential element of a plaintiff's cause of action. (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 209.) Failure to comply subjects the complaint to a general demurrer for failure to state a cause of action. (*Ibid.*) For the government claim to be adequate, "[e]ach theory of recovery … must have been reflected in a timely claim. In addition, the factual circumstances set forth in the claim must correspond with the facts alleged in the complaint." (*Munoz v. State of California* (1995) 33 Cal.App.4th 1767, 1776.) A complaint "is vulnerable to a [general] demurrer if it alleges a factual basis for recovery which is not fairly reflected in the written claim." (*Nelson v. State of California* (1982) 139 Cal.App.3d 72, 79.) On the other hand, where the complaint "merely elaborates or adds further detail to a claim, but is predicated on the same fundamental

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[8] A copy of plaintiff's government claim is submitted for judicial notice in connection with defendants' motion.

actions or failures to act by the defendants, courts have generally found the claim fairly reflects the facts pled in the complaint." (*Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 447.)

Plaintiff's government claim form, which we have judicially noticed, asked plaintiff to describe the specific damage or injury complained of. In response, plaintiff merely stated that "Correctional Officers: D. Wattle, B.A. Lacey have destroyed my typewriter and have illegally taken personal T-Shoes Fila … [a]nd have caused physical [i]njury." Further, plaintiff stated on the claim form that the "above officers [Lacey and Wattle] have conspired to deprive me of access to the courts, by knowingly and willingly [*sic*] that I cannot write with a pen due to my elbows and arms artrities [*sic*] the use of my typewriter was a very important tool to have access to the courts." Other defendants' names were stated on the face of the claim form, but no factual allegations were provided concerning them. Plaintiff did not state any other facts on the claim form, but without explanation, he attached over 100 pages of exhibits. The exhibits consisted largely of inmate grievances and other prison documents, but it was not clear from the face of the government claim form why they might have been relevant. Nor do we believe mere attachment of exhibits can substitute for an adequate description of the claim itself.

Comparing plaintiff's government claim to the TAC, we conclude the factual grounds for recovery presented in the TAC are not fairly reflected in the claim form. In a dramatic shift from the vague and sparse statement of facts in his government claim, which was centered largely on asserted harm to his typewriter and confiscation of shoes, plaintiff's TAC contained a wide array of factual allegations, damage claims and theories of recovery never mentioned in his government claim.[9] As noted, the TAC broadly alleged that defendant Lacey harassed him by asking for a copy of an inmate grievance,

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9 The TAC characterized the causes of action as (i) civil rights or constitutional violation; (ii) intentional infliction of emotional distress; (iii) negligent infliction of emotional distress; (iv) hostile prison environment or harassment; and (v) negligence.

threatened to move plaintiff out of the building, searched his cell and confiscated various property items without providing a receipt, called him insulting names, referred to him as a child molester, asked him to take off his socks, stopped him from going to the law library, read his mail and made false "write ups." These incidents were not set forth on plaintiff's government claim. With the exception of the typewriter incident, the TAC alleged multiple property items never mentioned in the government claim that were allegedly confiscated. Also, the TAC does not seek return of property or reimbursement for property items lost or confiscated, but rather a recovery for severe emotional distress or broad mental and emotional damages for alleged harassing conduct—even though the government claim did not mention either harassment or severe emotional distress. According to the TAC, the other defendants including Tennison, Baldwin, Kavanaugh, Quinn, Koenig, Lackner, Chavez and Foston allegedly "allowed, failed to prevent, concealed or condoned" the conduct of Lacey and Wattle by routinely denying or disposing of plaintiff's grievances and administrative appeals. However, such facts or theories were not stated on the government claim form.

We conclude that plaintiff's government claim did not satisfy the claim presentation requirement because it did not provide adequate notice of the factual claims and theories set forth in the TAC. While plaintiff named all of the defendants in his government claim, he presented no factual basis whatsoever concerning Kavanaugh, Quinn, Chavez, Tennison, Lackner, Koenig, and Baldwin. As to defendants Lacey and Wattle, the claim form merely provides facts as to the alleged destruction of a typewriter. Plaintiff's TAC presented an array of distinct factual allegations and claims against Lacey and Wattle that were not presented or reflected in his government claim. Moreover, even regarding the typewriter, the TAC shifts the factual theory of the alleged wrongdoing from a destruction of the typewriter to a confiscation of it on the ground that the officers had discovered contraband, with Lacey subsequently not returning it because it was apparently broken.

In short, the facts and theories alleged in plaintiff's TAC are not equivalent to or fairly reflected in plaintiff's government claim. As noted, where a plaintiff has failed to adequately comply with the government claim presentation requirement, it results in a failure to state a cause of action. Therefore, the evidence of the government claim presented in defendants' motion, when that evidence is compared to the TAC, shows that plaintiff does not have a reasonable probability of prevailing on any of the causes of action as to which a government claim was required—that is, all of the causes of action in the TAC with the possible exception of plaintiff's purported "civil rights" cause of action. (See, e.g., 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 245, pp. 327–328 [federal civil rights or constitutional claims are not subject to Government Claims Act requirements].)

2. *Other Allegations Materially Inadequate*

Plaintiff alleges in his first cause of action in the TAC that defendants deprived him of his constitutional, statutory and civil rights. However, plaintiff failed to identify any state or federal constitutional right, or any state or federal statutory civil right, that was allegedly violated. Where a pleading is so vague and conclusory that it fails to identify the legal basis for the cause of action, it is clearly insufficient. (*Dumm v. Pacific Valves* (1956) 146 Cal.App.2d 792, 799 [facts must be alleged with sufficient clarity or certainty to inform the defendant of the issues to be met]; *Gonzales v. State of California* (1977) 68 Cal.App.3d 621, 634 [same]; see also, *Kennedy v. H&M Landing, Inc*. (1976) 529 F.2d 987, 989 [a pleading is insufficient to state a civil rights claim if allegations are mere conclusions]; *Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 654 [some particularization of nature of constitutional or other deprivation is needed].) Therefore, the purported civil rights cause of action is too vague and inadequate to have a reasonable probability of surviving judicial scrutiny in plaintiff's appeal.

Further, defendants' motion for security points out that plaintiff failed to state a cause of action in the TAC for several other reasons. Specifically, defendants draw our

attention to the lack of any sufficient allegation of facts to show outrageous conduct or severe or serious emotional distress for purposes of the intentional or negligent infliction of emotional distress claims. As explained below, we believe these are accurate assessments of major deficiencies in plaintiff's TAC.

To state a cause of action for intentional infliction of emotional distress, the necessary elements for liability include that the defendant's conduct was "extreme and outrageous" and that the plaintiff, as a result, suffered "severe or extreme emotional distress." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 903.) For conduct to be deemed outrageous, it must be so extreme as to exceed all bounds of that usually tolerated by a civilized community. (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209.) Whether behavior is extreme and outrageous is a legal determination to be made by the court. (*Faunce v. Cate* (2013) 222 Cal.App.4th 166, 172.) With respect to the requirement that a plaintiff suffered *severe* emotional distress, a high bar has been set by the Supreme Court. That is, severe emotional distress means emotional distress of such substantial quality or enduring quality that no reasonable person in civilized society should be expected to endure it. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051.) Thus, liability does not extend to mere insults, indignities, threats, announces, petty oppressions, or other trivialities. (*Ibid*.) Nor does it extend to mere discomfort, worry, anxiety, upset stomach, concern or agitation. (*Ibid*.) Likewise, with respect to negligent infliction of emotional distress, the degree of emotional distress that must have been suffered—i.e., "serious" emotional distress—is so similar to "severe" emotional distress that one court has held the two standards to be functionally equivalent. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1377–1378, citing *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [holding the required "serious" mental or emotional distress for purposes of negligent infliction of emotional distress may be found if "a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case"].)

Based on the above, we agree with defendants that plaintiff failed to set forth a factual basis to establish extreme and outrageous conduct. The conduct alleged did not appear to exceed all bounds of what would have to be tolerated, especially given the context of a prison environment and the difficulties inherent in housing and guarding inmates. As to the degree of emotional distress experienced, plaintiff's conclusory allegations that he suffered such reactions as stress, anxiety, ridicule, worry, humiliation, loss of sleep, and the like, are patently insufficient under the circumstances to show that either "severe" or "serious" emotional distress was suffered.

As a prisoner, plaintiff is obviously going to be subject to searches of his cell and person, questioning about his activities, and confiscation of apparent contraband for safety and security reasons. Of course, considerable latitude must be extended to prison staff in maintaining safety and security. And while verbal insults may be unprofessional and demeaning, they are insufficient to support a claim here. A person is expected to harden himself or herself to a certain amount of rough or unkind language, and this would be particularly true in the prison context. For all these reasons, defendants are correct that the FAC fails to state a cause of action for either intentional or negligent infliction of emotional distress.

Additionally, we note that plaintiff's negligence cause of action is wholly duplicative of the cause of action for negligent infliction of emotional distress. Therefore, it is inadequate for the same reasons noted above regarding the claim of negligent infliction of emotional distress. In any event, plaintiff's negligence cause of action merely consists of a vague and factually barren recitation of legal conclusions and purported emotional harm rather than an adequate statement of facts constituting a cause of action. (See § 430.10, subd. (c).)

Finally, plaintiff's conclusory allegation that defendants Chavez, Quinn, Kavanaugh, Lackner, Baldwin, Tennison, Koenig and Foston ratified the alleged wrongdoing of Lacey and Wattle, and on the basis of said ratification must incur

individual liability for contributing to a "hostile incarceration environment" does not state a cognizable claim. No potential basis for a principal-agent relationship among the named individuals has been factually alleged to conceivably support a ratification theory. Plaintiff's allegations reference Civil Code section 2339 and Government Code section 815.2. However, those sections concern, respectively, a principal who employs an agent and later ratifies the agent's conduct, and a government entity generally being liable for an injury proximately caused by an act or omission of a public employee acting within the scope of his employment. Neither situation is even remotely or potentially present here as a basis for individual liability on the part of the several named individual codefendants under the allegations. (See Gov. Code, § 820.8 ["Except as otherwise provided by statute, a public employee is not liable for an injury caused by the act or omission of another person."].)

In light of the foregoing discussion, it is clear to this court based on plaintiff's failure to present an adequate government claim *and* the existence of glaring and material pleading deficiencies in the TAC that plaintiff does not have a reasonable probability of prevailing in his appeal in case No. F074756. Therefore, defendants have met their burden under sections 391.1 and 391.3, subdivision (a), and defendants' motion for an order requiring plaintiff to furnish security in that appeal is hereby granted. In their motion, defendants have requested that plaintiff be required to post security in the amount of $8,500. We find that amount to be reasonable and supported by the evidence presented in the declaration of Deputy Attorney General Joanna Hood. Accordingly, plaintiff is ordered to furnish security in the amount of $8,500 in his appeal in case No. F074756, for the benefit of defendants, in accordance with the disposition below. If the security is not furnished as ordered, plaintiff's appeal in case No. F074756 will be dismissed. (§ 391.4.)

DISPOSITION

The court finds that plaintiff, Guillermo Garcia, is a vexatious litigant within the meaning of section 391, subdivision (b)(1) of the vexatious litigant law. Additionally, there is no reasonable probability plaintiff will prevail in his appeal before this court in case No. F074756. Plaintiff shall have 60 days from the filing date of this opinion to post security with this court for the benefit of defendants in the amount of $8,500 regarding the appeal in case No. F074756. In the event security is not timely posted, the appeal in case No. F074756 will be dismissed. Further, we hereby enter a prefiling order against plaintiff, Guillermo Garcia. Henceforth, pursuant to section 391.7, plaintiff Guillermo Garcia may not file "any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed." (§ 391.7, subd. (a).) Disobedience of this order may be punished as a contempt of court. (*Ibid*.) "The presiding justice or presiding judge shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding justice or presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3." (§ 391.7, subd. (b).)

The clerk of this court is directed to provide a copy of this opinion and order to the Judicial Council. (§ 391.7, subd. (f).)

_____
LEVY, Acting P.J.

WE CONCUR:

_____
DETJEN, J.

_____
DE SANTOS, J.